



Virginia  
Regulatory  
Town Hall

[townhall.virginia.gov](http://townhall.virginia.gov)

## Proposed Regulation Agency Background Document

<b>Approving authority name</b>	Department of Environmental Quality
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-260
<b>Regulation title</b>	Water Quality Standards
<b>Action title</b>	Amendment to the state's Antidegradation Policy by designating two tributaries to the Pedlar River, three tributaries to the North Fork of the Buffalo River, and a portion of the North Fork of the Buffalo River as Exceptional State Waters.
<b>Document preparation date</b>	September 15, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

The State Water Control Board (Board) is proposing amendments to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards Regulation to designate five surface waters and a segment of a sixth surface water for special protection as Exceptional State Waters.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site  
<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site  
<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site  
<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>  
<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The EPA Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

**Purpose**

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

This proposed amendment is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

**Substance**

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)*

---

The proposed amendments to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards, would designate two tributaries to the Pedlar River, three tributaries to the North Fork of the Buffalo River, and a portion of the North Fork of the Buffalo River for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

---

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Waters sections.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. However, the only riparian landowner for each of these waters is a federal agency (US Forest Service) and none of these waters contain any permitted point source discharges nor are any anticipated by the applicable federal agency.

The primary advantage to the public is that these waters will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's November 15, 2004 "04-2021, Guidance for Exceptional State Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3)." Although all of these waters proposed for designation are located on public (federal) land, those localities and businesses located near the designated waters may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that led to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of these amendments.

### Requirements More Restrictive Than Federal

*Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

---

The proposed amendments do not exceed applicable federal minimum requirements

### Locality Particularly Affected

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

---

Amherst County

### Public Participation

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest land preservation.*

---

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and on any impacts of the regulation on farm and forest land preservation. Also, the Board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

The Board also seeks comment on whether the eligibility decision criteria for Exceptional State Water designation are met of each of these waters and whether the upper and lower boundary designations are appropriately delineated for each water body.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail, email or fax to Jean W. Gregory, Office of Water Quality Programs, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, (804) 698-4113, by fax to (804) 698-4522, or e-mail [jwgregory@deq.virginia.gov](mailto:jwgregory@deq.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period.

A public hearing will be held and notice of the public hearing can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>	<p>The projected cost to implement and enforce the proposed regulatory amendments should not cause any additional financial impact to the state. These amendments are updates of existing rules and while the staff may have to change the way permit issuance and water quality assessments are conducted, it will not take additional staff or resources to do this. These programs are funded by EPA 106 grants.</p>
<p><b>Projected cost of the regulation on localities</b></p>	<p>It is not expected that these Exceptional State Waters designations will impose a cost on the localities, as these waters are all located on federal lands.</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b></p>	<p>Riparian landowners adjacent to the designated water bodies. For this rulemaking, the United States Forest Service is the only identified landowner. No small business is impacted.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>1</p>
<p><b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b></p>	<p>None, unless the alternative to discharging to the designated water body requires some additional financial expenditure.</p>

**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

In compliance with the State Water Control Board’s Public Participation Guidelines (9 VAC 25-10-20 C), the Department will consider all alternatives which are considered to be less burdensome and less intrusive for achieving the essential purpose of the amendment, and any other alternatives presented during the proposed rulemaking.

The primary alternative considered to date was to leave the regulation unchanged. This was not the alternative chosen because these water bodies met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

**Regulatory Flexibility Analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

The water bodies proposed for designation are on federal (US Forest Service) land and there are no small businesses identified that would be impacted.

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

A Notice of Intended Regulatory Action was published in the Virginia Regulatory Town Hall on April 18, 2005 with the comment period ending on May 27, 2005. A public meeting was held in Lynchburg on May 24, 2005. Below is a summary of public comments received during that comment period.

Commenter	Comment
John Bellemore, US Forest Service	Provided verbal comment reiterating their previous comment in a letter to DEQ staff dated November 10, 2004. The Forest Service supports the nomination of a portion of the North Fork Buffalo River, Cove Creek, Little Cove Creek, and Rocky Branch. They do not support the nomination of Shady Mountain Creek and Roberts Creek as they are of the opinion that neither meets the criteria necessary to be considered for Exceptional State Waters designation.
Rene Hypes, Dept. of Conservation and Recreation (DCR)	Provided written comment in support of the nominated waters and stated that the watershed surrounding them is considered by their agency a conservation site with very high significance due to the presence of the James spiny mussel which is classified as endangered by the US Fish and Wildlife Service and the Department of Game and Inland Fisheries.
Dan E. French, Director of Public Utilities	Provided written comment restating the support of the Amherst County Service Authority (the petitioning party) as well as that of the Amherst County Board of Supervisors.
David W. Carr & Sarah A. Francisco, SELC	Provided written comment on behalf of the Southern Environmental Law

	Center (SELC) in full support of the designation. They state that waters meet the eligibility criteria necessary to be considered for Exceptional State Waters designation and designation of these waters would complement the adjacent waters recently designated by the State Water Control Board and will enhance protection of Amherst County’s drinking water sources. They also stated the importance of preserving these waters in their existing, exceptional condition for the use and enjoyment of future generations.
--	---

**AGENCY RESPONSE:** The agency response to the public comments is that staff has determined that these six waters proposed for designation meet the required eligibility criteria necessary for consideration as Exceptional State Waters and, to the best determination of agency staff, are wholly located on publicly owned land.

### Family impact

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.

### Detail of changes

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	(1) Little Stony Creek in Giles County from the first footbridge above the Cascades picnic area, upstream to the 3,300-foot elevation.  (2) Bottom Creek in Montgomery County and Roanoke County from Route 669 (Patterson Drive)	The addition of six water bodies to 9 VAC 25-260-30.A.3.c. These waters meet the eligibility criteria necessary to be designated as Exceptional State Waters.

		<p>downstream to the last property boundary of the Nature Conservancy on the southern side of the creek.</p> <p>(3) Lake Drummond, located on U.S. Fish and Wildlife Service property, is nominated in its entirety within the cities of Chesapeake and Suffolk excluding any ditches and/or tributaries.</p> <p>(4) North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters.</p> <p>(5) Brown Mountain Creek, located on U.S. Forest Service land in Amherst County, from the City of Lynchburg property boundary upstream to the first crossing with the national forest property boundary.</p> <p>(6) Laurel Fork, located on U.S. Forest Service land in Highland County, from the national forest property boundary below Route 642 downstream to the Virginia/West Virginia state line.</p> <p>(7) North Fork of the Buffalo River, located on U.S. Forest Service land in Amherst County, from its confluence with Rocky Branch upstream to its headwaters.</p> <p>(8) Pedlar River, located on U.S. Forest Service land in Amherst County, from where the river crosses FR 39 upstream to the first crossing with the national forest property boundary.</p> <p>(9) Ramseys Draft, located on U.S. Forest Service land in Augusta County, from its headwaters (which includes Right and Left Prong Ramseys Draft) downstream to the Wilderness Area boundary.</p> <p>(10) Whitetop Laurel Creek, located on U.S. Forest Service land in Washington County, from the national forest boundary immediately upstream from the second railroad trestle crossing the creek above Taylors Valley upstream to the confluence of Green Cove Creek.</p> <p>(11) Ragged Island Creek in Isle of Wight County from its confluence with the James River at a line drawn across</p>	
--	--	--	--

		<p>the creek mouth at N36°56.306'/W76°29.136' to N36°55.469'/W76°29.802' upstream to a line drawn across the main stem of the creek at N36°57.094'/W76°30.473' to N36°57.113'/W76°30.434', excluding wetlands and impounded areas and including only those tributaries completely contained within the Ragged Island Creek Wildlife Management Area on the northeastern side of the creek.</p> <p>(12) (Reserved)                  (13) (Reserved)                  (14) (Reserved)                  (15) (Reserved)                  (16) (Reserved)                  (17) (Reserved)                  (18) (Reserved)                  (19) (Reserved)                  (20) (Reserved)                  (21) (Reserved)                  (22) (Reserved)</p>	
--	--	---	--

In 9 VAC 25-260-30 the following amendments are proposed under 9 VAC 25-260-30.A.3.c:

- (23) Roberts Creek from its confluence with the Pedlar River upstream to its first crossing with the National Forest boundary.
- (24) Shady Mountain Creek from its headwaters downstream to its confluence with the Pedlar River. Cove Creek from its headwaters downstream to the National Forest boundary.
- (25) Cove Creek from its headwaters downstream to the National Forest boundary.
- (26) Little Cove Creek and its tributaries from the headwaters downstream to the National Forest boundary.
- (27) Rocky Branch from its headwaters downstream to its confluence with the North Fork of the Buffalo River.
- (28) North Fork of the Buffalo River from its confluence with Rocky Branch downstream to the National Forest Boundary.